

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILMINGTON TRUST, NATIONAL
ASSOCIATION, AS TRUSTEE FOR THE
BENEFIT OF THE REGISTERED HOLDERS
OF WELLS FARGO COMMERCIAL MORTGAGE
TRUST 2018-C44, COMMERCIAL MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES
20,

22-cv-5855 (JGK)

MEMORANDUM OPINION
AND ORDER

Plaintiff,

- against -

31 PRINCE STREET, LLC, ET AL.,

Defendants.

JOHN G. KOELTL, District Judge:

The plaintiff, Wilmington Trust, brought this action against the defendants, 31 Prince Street, LLC, Wah Kok Realty Corp., Edmond Li, the New York City Office of Administrative Trials and Hearings, and any unknown tenants, occupants, persons, or corporations having or claiming an interest in the premises at issue in the litigation, in order to foreclose on a mortgage for a principal amount of \$41,000,000 that is secured by certain of the Borrowers' properties and the rents and leases associated with those properties. On January 25, 2023, this Court granted the plaintiff's motion to appoint a receiver to manage the properties at issue in this case during the pendency of this litigation. See Wilmington Tr., Nat'l Assoc. v. 31

Prince Street, LLC, No. 22-cv-5855, 2023 WL 414249, at *5

(S.D.N.Y. Jan. 25, 2023) ("Receivership Opinion").

The plaintiff now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56 seeking: (1) to foreclose on the properties at issue in this case and to strike certain affirmative defenses asserted by the defendants; (2) to enter a default judgment against defendant New York City Office of Administrative Trials and Hearings; (3) to refer the calculation of the amount owed by the defendants on an outstanding loan in this case (the "Loan") to the Magistrate Judge; and (4) to sever Count Five of the complaint, which asserts a claim for breach of contract against the Guarantor.

I.

The Court assumes familiarity with the facts of this case, which are set out in greater detail in the Receivership Opinion, 2023 WL 414249, at *1-2.

II.

The standard for granting summary judgment is well established. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the materials in the record that "it believes

demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). At the summary judgment stage, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party meets its burden, the nonmoving party must produce evidence in the record and “may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible.” Ying Jing Gan v. City of N.Y., 996 F.2d 522, 532 (2d Cir. 1993).

III.

A.

The plaintiff has demonstrated its entitlement to foreclosure in this action. Under New York law, “in a foreclosure action, . . . a plaintiff establishes its *prima facie* entitlement to summary judgment by producing evidence of the mortgage, the note, and the [defendants’] default.” Gustavia Home, LLC v. Rutty, 785 F. App’x 11, 14 (2d Cir. 2019). The plaintiff has already “produced documents demonstrating the assignment of the Note and Mortgage to the plaintiff,” thereby

"showing that it holds both the Note and the Mortgage," and those documents have also been produced as exhibits on this motion for summary judgment. See Receivership Opinion, 2023 WL 414249, at *4; ECF No. 74-1, Exs. 3, 4. In addition, there is no dispute that the defendants have defaulted on the Loan, which the Receivership Opinion sets out in greater detail. See Receivership Opinion, 2023 WL 414249, at *3-4. The plaintiff has thus demonstrated its prima facie entitlement to foreclosure.

The defendants dispute that the plaintiff has standing to seek foreclosure. "Where, as here, the defendant contests standing to foreclose, the plaintiff must prove its standing as part of its prima facie showing. A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note." Gustavia, 785 F. App'x at 14. In this case, the plaintiff has produced evidence that it is the holder of the relevant Note. See ECF No. 74-1, Ex. 3. Because "the transfer of the promissory note to the plaintiff before the action has commenced is sufficient to demonstrate standing because the mortgage passes incident to the note," the defendants' argument that the plaintiff lacks standing is without merit. Gustavia, 685 F. App'x at 14.

The defendants' only response to the plaintiff's production of the relevant documents is to protest that the documents

cannot be considered on this motion for summary judgment because they are not presented in admissible form. "The evidence considered on summary judgment must generally be admissible evidence." LaSalle Bank Nat'l Ass'n v. Nomura Asset Cap. Corp., 424 F.3d 195, 205 (2d Cir. 2005). The defendants argue that the documents are not sufficiently authenticated as business records pursuant to the business records exception to the rule against hearsay provided by Federal Rule of Evidence 803(6) because the plaintiff has failed to lay a proper foundation for the admission of the documents.

"New York courts have repeatedly held that proof of physical possession . . . is sufficient on its own to prove a plaintiff's standing to foreclose on the mortgage associated with the note." OneWest Bank, N.A. v. Melina, 827 F.3d 214, 223 (2d Cir. 2016). In this case, the plaintiff has provided proof of physical possession of the underlying Note and Mortgage. The plaintiff has also shown that the documents are sufficiently authenticated. The plaintiff has provided a declaration by Joao Gauer, the Vice President of Asset Management with the Special Servicer to the plaintiff, declaring that, based on Gauer's personal knowledge, the Note and Mortgage were maintained in the ordinary course of the Special Servicer's business. Gauer Decl., ECF No. 74, ¶ 3. The declaration also provides that "all the exhibits attached to the complaint and/or this declaration were

received, created, or otherwise generated at or near the dates reflected on such documents . . . [and that the] exhibits . . . are true and correct copies of the corresponding documents in the Special Servicer's business records that are in the custody and control of the Special Servicer." Id. "Rule 803(6) allows business records to be admitted if witnesses testify that the records are integrated into a company's records and relied upon in its day to day operations," and "[e]ven if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity." United States v. Jakobetz, 955 F.2d 786, 801 (2d Cir. 1992). In this case, the Special Servicer relied on the documents provided during its day to day operations acting as the plaintiff's agent, and the documents were incorporated into its business "to a sufficient degree to permit an inference" as to their authenticity. Id. Accordingly, the plaintiff has established the authenticity of the documents sufficient to support standing in this action. See OneWest Bank, N.A. v. Guerrero, No. 14-cv-3754, 2018 WL 2727891, at *4 (S.D.N.Y. June 6, 2018) (finding that proof of physical possession by affidavit of the plaintiff's Assistant Secretary was sufficient to support standing in a mortgage foreclosure action).

Moreover, the plaintiff has also produced the assignments of the mortgage which detail the chain of ownership of the mortgage from the original lender to the plaintiff. See ECF No. 74-2, Ex. 9; ECF No. 74-3, Exs. 13, 17. The provided mortgage assignments are self-authenticating documents pursuant to Federal Rule of Evidence 902(1) because they are "attached to the recorded filing made with the New York City Department of Finance, which bears the appropriate seal and signature of a government official." CIT Bank, N.A. v. Schiffman, No. 16-cv-5772, 2022 WL 912520, at *2 (E.D.N.Y. Mar. 29, 2022). And the mortgage assignments are covered by an exception to the rule against hearsay for records of documents that affect an interest in property under Federal Rule of Evidence 803(14). Id.

To establish standing to foreclose, the plaintiff needs to prove only that "it was either the holder or assignee of the underlying note." Gustavia, 785 F. App'x at 14. "The plaintiff has produced documentary evidence demonstrating that the plaintiff is the assignee of the Note by virtue of assignments of the Mortgage, which reference the underlying Note."

Wilmington Tr., Nat'l Ass'n v. Winta Asset Mgmt. LLC, No. 20-cv-5309, 2022 WL 2657166, at *6 (S.D.N.Y. July 8, 2022). A "mortgage assignment referencing the transfer of the mortgage together with the notes and bonds or obligations described in the Mortgage is sufficient to assign both the Mortgage and the

underlying Note." Id. Accordingly, the plaintiff has established that it is the assignee of the Mortgage, and thereby the assignee of the Note.

In any event, on a motion for summary judgment, the plaintiff needs to show only that the evidence provided "would be admissible at a trial." See Lyons v. Lancer Ins. Co., 681 F.3d 50, 57 (2d Cir. 2012); see also Smith v. City of New York, 697 F. App'x 88, 89 (2d Cir. 2017) ("We need not resolve whether the documents fall within . . . the business-records exception . . . because, in any case, material relied on at summary judgment need not be admissible in the form presented to the district court . . . so long as the evidence in question will be presented in an admissible form at trial."). Accordingly, "documents submitted in support of summary judgment may be considered if a competent custodian would be able to verify their authenticity at trial." Emanuel v. Gap, Inc., 2022 WL 30843177, at *3 (S.D.N.Y. Aug. 3, 2022). The plaintiff has more than shown that the documents provided would be admissible at trial. Accordingly, the documents provided are competent evidence, and the plaintiff's motion for summary judgment of foreclosure is **granted**.

B.

The plaintiff also moves to strike two affirmative defenses pleaded by the defendants in their Answer. ECF No. 36. "Motions

to strike are generally disfavored and will not be granted unless it appears to a certainty that [the] plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." Brooklyn Union Gas Co. v. Exxon Mobil Corp., 478 F. Supp. 3d 417, 425 (E.D.N.Y. 2020). The plaintiff seeks to strike the defendants' first affirmative defense that the plaintiff lacks standing in this case. However, there is no need to strike that defense. It is enough that this defense has already been shown to be without merit because the defendants' have not met their burden to show the insufficiency of the documents provided. The plaintiff also seeks to strike the defendants' second affirmative defense that the Special Servicer lacks authority to bring this action on the plaintiff's behalf. However, the plaintiff has provided a "Pooling and Services Agreement" authorizing Rialto Capital Advisors, LLC to act as Special Servicer the plaintiff's behalf. ECF No. 74-1. The Pooling and Services Agreement and an associated Limited Power of Attorney makes clear that the Special Servicer, as the plaintiff's agent, is authorized to bring suit on behalf of the plaintiff. See id. §§ 3.01, 3.09; ECF No. 74-3, Ex. 24. Accordingly, there is similarly no need to strike the defendants' second affirmative defense because the defense is also without merit. The plaintiff's motion to strike is **denied as moot**.

C.

The plaintiff also seeks an entry of default judgment against defendant the New York City Office of Administrative Trials and Hearings (the "Defaulting Defendant") to eliminate the possibility that the Defaulting Defendant would be able to block the foreclosure. The Defaulting Defendant has not appeared in this case, and the Clerk of Court has issued a certificate of default against the Defaulting Defendant. ECF No. 50. The remaining defendants do not oppose the plaintiff's application for a default judgment against the Defaulting Defendant. Accordingly, the default against the New York City Office of Administrative Trials and Hearings is **granted**.

D.

The plaintiff also moves pursuant to Federal Rule of Civil Procedure 21 to sever Count Five of its Complaint for breach of contract against the Guarantor. Rule 21 authorizes severance of any claim "even without a finding of improper joinder[] where there are sufficient other reasons for ordering a severance." Wyndham Assocs. V. Bintliff, 398 F. 2d 614, 618 (2d Cir. 1968). The plaintiff wishes to sever its claim against the Guarantor because, at a later date, the plaintiff may still seek a deficiency judgment against the Guarantor in the event that an auction of the Property results in a deficiency with respect to the amount due and owing to the plaintiff. Pl.'s Memo., ECF No.

76, at 13. The defendants do not oppose this motion.

Accordingly, the motion is **granted**, and Count Five of the Complaint is severed.

CONCLUSION

The Court has considered all the arguments of the parties. To the extent not specifically addressed above, the arguments are either moot or without merit. For the foregoing reasons, the plaintiff's motion for summary judgment is **granted**, and the plaintiff's motion to strike certain affirmative defenses is **denied as moot**. The case is referred to Magistrate Judge Moses for a calculation of the amount owed by the defendants on the Loan. The Clerk is directed to close Docket No. 72.

SO ORDERED.

Dated: New York, New York
 May 25, 2023



John G. Koeltl
United States District Judge